No. 3057

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

MATILDA C. NEASHAM,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Plaintiff in Error.

JAMES H. MCINTOSH,
Of Counsel.

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Reply Brief for Plaintiff in Error.

There are statements, both as to facts and law, and citations of authorities in the Brief and Argument for defendant in error, to which we desire to reply in a more permanent and definite way and manner than by an oral argument; hence this Reply Brief for plaintiff in error. We shall herein refer to defendant in error as plaintiff, to plaintiff in error as defendant, to Transcript of Record as Tr., as in the Brief for plaintiff in error heretofore filed herein, and to the Brief and Argument for defendant in error as plaintiff's brief, and to the Brief for plaintiff in error as defendant's brief.

Plaintiff in her brief, pp. 46–54, discusses—Assignment of Error VII, Tr. 58, 59, specified at pp. 69–71, and argued at pp. 69–104, respectively, in defendant's brief; said assignment being to the effect that the Court erred in permitting plaintiff, over de-

fendant's objection, to offer and read in evidence what purported to be a portion of the testimony of Sheriff Ferrel given as a witness before the coroner, concerning the condition of the pistol referred to in the record.

At pp. 50, 51 of her brief, plaintiff sets out a part of the examination of Sheriff Ferrel, which said testimony appears in Tr. 165, 166, and then plaintiff makes the following statement,—

> "The record, therefore, does not sustain the statement in the alleged error, numbered VII, 'Said witness having previously testified * * * that he did not give the testimony attributed to him'; on the contrary, the witness expressly admitted giving the testimony referred to."

We are astounded at plaintiff's contention and the statement above quoted. We ask that the Court turn to the Transcript, p. 165, and read the record there found concerning this matter, Tr. 165–167; it will be seen that immediately following the questions and answers set out in plaintiff's brief, *supra,* pp. 50, 51, the following questions and answers appear,—

> "Q. Now the question was repeated: 'Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber, and there is nine in the magazine.' Did you so testify?
>
> A. *No, sir, I did not.* I will explain my testimony.
>
> The COURT.—No, he is just asking you about this testimony.

WITNESS.—They got the answers to the questions mixed.

Mr. KEPNER.—(Q.) What is that?

A. They have got the answers to the questions mixed, that is all.

The COURT.—Did you state in substance then, Mr. Sheriff, at that inquest, that you had removed the shell from the chamber, and that there were nine shells in the magazine?

A. No. The magazine won't hold nine shells.

Q. You have stated it twice there.

A. *I never saw that testimony*—I haven't seen what this lady has written down.

Mr. KEPNER.—Well, I suppose this lady would take correctly what you testify.

A. I suppose that, too, *but I didn't see it.*

The COURT.—That is an immaterial digression.

Mr. KEPNER.—(Q.) Now did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger?

A. *I did not.*"

In the light of this record, how can plaintiff justify the statement contained in her brief, p. 51, which is above quoted?

Again at p. 54, plaintiff says,—

"So, plaintiff in error is mistaken in asserting in this alleged error (No. VII) that 'There is no statute authorizing the use of such testimony'; and is unfair in stating the manner in which the testimony referred to was used."

We repeat the statement complained of, and must earnestly urge that the use made by plaintiff of the purported testimony of witness Sheriff Ferrel before the coroner, under the record in this case, was prejudicial error, and is not authorized or supported by any statute, rule or decisions of courts. (See Defendant's Brief, pp. 96–104.)

The authorities cited by plaintiff, Brief, pp. 47–49, do not sustain plaintiff's contention; on the contrary, they sustain the contention of defendant that the admission in evidence of the purported testimony of witness Sheriff Ferrel, which was admitted in evidence over defendant's objection, under the record in this case, was a violation of all rules and was error, prejudicial to defendant.

To sustain her contention in this regard, plaintiff, at p. 47 in Her Brief, quotes a note found in Kerr's Cyclopedic Codes of California, vol. 4, Penal Code, under sec. 1515, p. 1365. The note cites two California cases,—People v. Devine, 44 Cal. 452, 459; People v. Lambert, 170 Cal. 170, the citation being error, and should read 120 Cal. 170, 50 Pac. should be 52 Pac. 307; in plaintiff's brief the errors in citation above noted are found. Perhaps plaintiff's attorney did not take the trouble to look up the case; if he had, he probably would have corrected the erroneous citation and further, if he had read the two cases cited, they would perhaps not have been cited in support of plaintiff's contention under the record in this case.

It will be recalled, as above set forth, that witness Sheriff Ferrel, Tr. 167, said—

"I never saw that testimony— * * * but I didn't see it."

Also—when plaintiff's attorney offered in evidence the testimony herein referred to, as appears at Tr. 251, defendant's attorney objected to the offer, the record reciting in that regard—

"Mr. HAWKINS.—I object to the offer on the ground it is not signed by the witness; and on the further ground it is incompetent, irrelevant and immaterial."

The objection was overruled, and exception reserved, Tr. 252, and the testimony read to the jury.

We, therefore, have in connection with this record offered and admitted in evidence a statement by the witness that he never saw that testimony; and the objection that it was not signed by the witness, and that it was incompetent.

Referring now to the case cited by plaintiff, *supra,* People v. Devine, 44 Cal. 452—it was a criminal prosecution, defendant convicted of the crime of murder in the first degree; an inquest had been held, upon the body of Kamp, the deceased, by the coroner; that at the inquest the witness Mary Murphy had been sworn and had testified; at the trial it was sought to impeach the witness' testimony so given by the testimony given before the coroner; from the opinion, p. 455, we quote,—

"The inquest returned by the coroner and filed in the office of the clerk of the court below, and containing or purporting to contain the testimony of Mary Murphy, taken down under the

> direction of the coroner, *signed by the witness,* by her mark and her signature, attested by the coroner's clerk and certified by the coroner himself, was then produced by the counsel for the prisoner and offered as evidence of a supposed contradiction."

At p. 456, it appears that the coroner and his clerk were both called and examined concerning the testimony of the witness given at the inquest and as to the circumstances under which it had been reduced to writing and returned. From the opinion we quote,—

> "The statement of the testimony of the witness appeared to be *in the handwriting of the clerk,* and to have been taken down by him in the method stated to have been uniformly pursued by Dr. Letterman while he was coroner; that method was that the witness, being first duly sworn, was examined by the coroner in the presence of the jury, and the answers given were repeated by the coroner to the clerk, who thereupon wrote them down as given to him by the coroner. Upon the conclusion of the examination of the witness *the testimony* taken down in this manner *was read aloud for the purpose of correction* in any particular desired, and was thereupon *subscribed by the witness,* and if subscribed by mark (*as was the case with the testimony of Mary Murphy*), *was attested by the clerk.*"

Thus we see that in the case cited it appeared that the purported testimony offered for purposes of im-

peachment had been read over to the witness and had been signed by the witness; thus making the document the statement of the witness, which the Court held was proper. The Court cites several authorities in support of its conclusion, among them being People v. Stephens, 19 N. Y. 549. From the syllabus of the Stephens case, *supra,* we quote the following,—

> "For the purpose of discrediting a witness, his testimony given before the coroner, taken down in writing, *read over to and subscribed by the witness,* may be read in evidence, * * * "

At p. 573 of the opinion in the Stephens case, *supra,* it appears that the coroner's clerk was sworn and testified as a witness; from the opinion we quote,—

> "He testified that he had taken down the evidence of each witness correctly; that he had *read it over* to the witness, and that such *witness had then signed* his or her name to the *written deposition.* * * *
>
> The papers were not mere memoranda made by the clerk to help his recollection, but were *depositions signed by the witnesses after they had been deliberately read over to them,* and they had been requested to make or suggest alterations if they were incorrect."

No such facts were shown in the case at bar.

The Court in People v. Devine, *supra,* 459, says,—

> "The proper practice to be pursued by an officer in taking and certifying testimony at an

> inquest is referred to by Guerney, B., in R. V. Plummer, 1 Car. & Kir. 604."

The course pointed out in the authority cited is that the testimony of the witnesses should be reduced to writing, and then read over to and signed by them. It is the testimony thus taken which may be introduced in evidence, as is clearly shown from the opinion of the Court in the Devine case, *supra,* where at p. 459 the Court says,—

> "That a witness may be contradicted by the production of a *deposition thus given* by him before a coroner, is as clear upon principle as that he might be contradicted by the production of his *deposition in chancery.*"

People v. Lambert, 120 Cal. 170, 52 Pac. 307, *supra,* cited by plaintiff, was not a proceeding before a coroner, but before a justice of the peace. From the 52 Pac. 309 it appears that "Christopher Lambert was a witness for the defendant. Upon cross-examination his attention was called to his testimony given before the justice of the peace, and the *deposition* was read." *The witness testified that the document as read was his former testimony.* The error complained of was in reading "the entire *deposition* of the witness taken in the Justice Court at the *preliminary examination.*" Clearly the case is not applicable to the facts in the case at bar.

Defendant does not contend that a deposition of a witness taken before a coroner and read over to and signed by the witness would not be admissible; but defendant's contention in this case is that the document used was never more than hearsay; that

there was no evidence whatever establishing as a fact that witness Ferrel had testified before the coroner as was recited in the document offered and admitted in evidence. The witness denied positively and emphatically that he had given such testimony; there was no attempt by plaintiff to show that the purported document correctly represented or stated the witness' testimony before the coroner.

Plaintiff also cites and quotes from Enc. of Evidence, vol. VII, pp. 54–57. The text refers to testimony before "a coroner's inquest," citing cases under Note 65. All of such cases contemplate that the deposition or testimony so offered for impeachment purposes had been read to and signed by the witnesses; in fact, some of the cases, e. g.,—

Consolidated Ice Machine Co. v. Keifer (Ill.), 25 N. E. 799, 802, recites in the opinion that the testimony was identified, that it was taken down by the coroner and signed by the witnesses. From the opinion we quote,—

> "Their deposition before the coroner had been read to, and signed by, these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examination in respect of written instruments. 1 Greenl., secs. 463, 465."

The reference by plaintiff in her Brief, p. 48, to the case of O'Brien v. Trousdale, decided by the Nevada Supreme Court, does not aid the plaintiff;

that case was in reference to a writ of prohibition. The rule stated by the Nevada Supreme Court is well recognized, provided the statute being interpreted is truly copied from some one state; but the rule is equally well established that where the statute under consideration may have been adopted from one of many states, the rule has no application. Assuming that the rule is applicable here we have, according to plaintiff's contention, the adoption by Nevada of its statute, sec. 7550, from the California statute, sec. 1515, Penal Code, *supra,* as construed by the opinion in People v. Devine, *supra,* 44 Cal. 452, which is to the effect that the deposition to be competent evidence must have been read over to and signed by the witness which does not appear to have been done in the case at bar.

Enc. of Evidence, vol. VII, p. 128, states the rule,—

> "A witness' variant statements may be proved by any evidence usually competent in a cause. They cannot be proved by mere hearsay."

The same author at p. 139 says,—

> "A writing said to contain a rehearsal of a witness' variant statements, but *to which he has not assented,* and which has not been proved to be correct, ordinarily is not by itself competent as evidence to prove such statements."

In Ferraris v. Kyle, 19 Nev. 435, 436, for the purpose of establishing the variance of former testimony, defendant offered in evidence the statement

upon motion for new trial; the offer was refused; the Court at p. 437 says,—

> "A document prepared in this way, it is scarcely necessary to say, should not be received without preliminary proof that *its report of the evidence is correct.*"

Nevada Constitution, art. VI, sec. 1, provides,—

> "The judicial power of this State shall be vested in a Supreme Court, District Courts and in justices of the peace. * * * "

The coroner has no judicial functions, and his acts are not in a judicial capacity, and the inquisition had before the coroner has no probative value. This matter is exhaustively considered by Wolverton, Judge, in the case of Cox v. Royal Tribe of Joseph, 42 Or. 365, 71 Pac. 73, where the Court was considering the admissibility of a record before a coroner under the Oregon statute, similar to the Nevada statute. The Court at p. 75 of 71 Pac. says,—

> "Such a document, before it can be admissible under any of the older authorities, must be judicial in character, and we cannot think that the mere fact that it is required to be returned to and filed with a clerk of a court of record endows it with that vitality."

It appears from the record in this case that a document offered in evidence over defendant's objection had never been seen by the witness was not signed by him, and he denied emphatically that he had given the testimony purported therein to have

been given by him; it was, therefore, not established that he had made the statement attributed to him by such document; its admission clearly impressed the jury, and it was admitted in violation of law and was error, prejudicial to defendant.

Plaintiff in her brief, p. 51, says,—

> "Moreover, the Record (see pages 165, 166, 167) shows no objection to the use of this transcript on cross-examination."

That statement is true, but when plaintiff offered the coroner's record, or a portion thereof, in evidence as appears at Tr. 251, defendant did object "to the offer on the ground it is not signed by the witness; and on the further ground it is incompetent, irrelevant and immaterial." The objection was overruled, to which an exception was taken and the portion read in evidence, as appears Tr. 252.

Plaintiff at p. 54 of her Brief says that the matter read to the jury at their request,—

> "JUROR.—We desire to have read the transcript of Sheriff Ferrel's evidence before the coroner's jury.
>
> The COURT.—That was read during his examination?
>
> JUROR.—Yes, sir, and taken in evidence."

was the cross-examination appearing on pp. 165–166, and not the transcript of the evidence before the coroner's jury. But it is apparent from the juror's request that the mind of the jury was fixed upon the purported testimony before the coroner's jury, and in fact the matter which was read to the jury incor-

porated all of the purported testimony before the coroner's jury, and answered the juror's request, and emphasized the error in admitting the purported evidence before the coroner's jury.

Plaintiff seemingly attempts to escape the effect of this error, and on p. 49 of her Brief refers to the fact that testimony incorporated in the coroner's transcript was read to the jury by consent. Consent to use matter that would not have been admissible without consent does not authorize the use of other matter not admissible over objection. By consent, incorporated into a written stipulation, as appears Tr. 114, testimony of persons who testified before the coroner was read. This consent and use in no way cures the admission, over objection, of matter offered by plaintiff, to which exception was taken and error assigned and specified.

Plaintiff in her Brief, pp. 54–79, discusses Assignment of Error No. XI, found in Tr. 62–66; specified at pp. 74–80, and argued at pp. 120–128, in defendant's Brief. Said assignment of error embraces the charge by the Court to the jury, whereby the jury was instructed, *inter alia:* That plaintiff has made out her cause of action; that the burden of proof was upon the defendant; that suicide or self-destruction was at variance with the ordinary human instincts and the presumption of the law was against self-destruction, and that self-destruction must be proved or established by evidence sufficient to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of death other than that of self-destruction; that the proof must

establish, with reasonable certainty that the death was the result of self-destruction, rather than accident, mischance, and if decedent was accidentally killed, although death results from his own acts, "it is not self-destruction or suicide so as to excuse a defendant's liability"; that if the jury find that the shooting was done by the deceased, but that it was done accidentally, or was the result of carelessness, the plaintiff would be entitled to a verdict; that the jury was permitted to base its verdict upon a theory wholly separate and apart from that advanced by either counsel, and if the jury in its examination of the evidence concludes it cannot account for the death in accordance with the theory advanced by either counsel, and could account for it in accordance with some other theory which the jury believe the evidence warrants, and that the jury was at perfect liberty to find its verdict according to such theory as suggests itself to the jury's judgment.

The assignment and the argument thereunder by defendant is attacked by plaintiff at other places in her Brief, to wit, near top of page 3, plaintiff says,—

> "The issue, thus presented by the pleadings involving three theories of the cause of death, namely, Murder, Suicide, and Accident, was tried," etc.

At p. 95 of her brief, plaintiff says,—

> "Plaintiff in error assumes that the wound in the throat was caused by a gunshot. There is no direct evidence to support that assumption."

This statement by plaintiff indicates the extent to which plaintiff's attorney will go in making statements to justify the verdict in this case.

At p. 55 plaintiff says,—

> "The assignment is not based upon correct premises; the statement, as shown by the foregoing excerpt, omits a very important averment in plaintiff's replication."

Plaintiff's assertions, above referred to, are not warranted under the record. The Court will, no doubt, be surprised, after its examination of the record, that plaintiff should now question the fact that the insured's death was the result of a gunshot wound or that the wound in the insured's mouth, through the soft palate in the back of the throat, was caused by a gunshot.

It is well settled in law that every pleading must be based upon some definite, consistent theory; that plaintiff cannot try his case upon one theory and then, after finding himself unable to prove it, shift to another.

Defendant in its amended answer, Tr. 12, *inter alia* alleged,—"the insured in said policy, was discovered dead, with a gunshot wound in the roof of his mouth." In this connection plaintiff in her reply, paragraph V, Tr. 15, 16, "alleges that * * * the insured * * * came to his death * * * from a gunshot wound." There is no evidence, or suggestion of evidence, that there was any gunshot wound other than the gunshot wound above referred to. Plaintiff's proof in chief, Plaintiff's Exhibit "B," proofs of death Tr. 310, 311, establishes imme-

diate cause of death of the insured to be "gunshot wound of head and brain." There was no issue under the pleadings other than that the death of the insured resulted from a gunshot wound; the case throughout was tried upon that theory, and that theory alone; the issue was—was the gunshot wound self-inflicted or inflicted by another, viz., "Self-destruction" vs. "Murder"? Plaintiff's theory being that insured was attacked and shot by the attacking person or persons. Throughout the record will be found statements sustaining the above statement as to the theory upon which the case was tried, and no statement appears in the record to the contrary until we come to the charge of the Court, submitting to the jury the question of accident, mischance or some theory other than "that advanced by either counsel," the theory referred to by the Court as "advanced by either counsel" being "Self-destruction," contended for by defendant, and "Murder," contended for by plaintiff.

Plaintiff in her Brief, p. 55 et seq., and at other places above referred to, seeks to justify the Court's submission to the jury of the question of accidental death or death by mischance, and cites cases discussing and declaring the law applicable to a case wherein the three issues—Murder, Suicide and Accident—are presented. Such cases are not applicable to and are easily distinguishable from the case at bar.

The pleadings, in the case at bar, not only do not involve but exclude "Accident" or "Mischance," and only present a case of death from a gunshot wound—the issue joined and tried being, Was it intentional

self-destruction or intentional killing by some one "other than the insured"?

The defendant in its amended answer alleged "the insured in said policy was discovered dead, with a gunshot wound in the roof of his mouth. That * * * the insured * * * destroyed himself, and then and there died as the result of a self-inflicted gunshot wound." (Tr. 12.) The plaintiff denied in her reply that Neasham "either *destroyed* himself, or either * * * died as the result of a *self-inflicted* gunshot wound, and in this behalf plaintiff alleges that * * * the insured * * * came to his death * * * at the hands of some person or persons unknown to plaintiff." (Tr. 14.) "And for a further reply * * * plaintiff alleges that * * * the insured * * * came to his death * * * from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff." (Tr. 15, 16.) "Some person or persons unknown—some person or persons other than the insured," as contended by plaintiff in Opening Statement. (Tr. 75.)

It is therefore manifest, from the pleadings and the statement of plaintiff that plaintiff's contention was that the insured did not "destroy himself" and did not die "as the result of a *self-inflicted* gunshot wound," and, therefore, necessarily did not shoot himself, either by *accident or mischance* or intentionally or at all, but that he was shot by some other person—clearly, positively and without doubt removing from the case any question of the death resulting from accident or mischance *on the part of the insured.*

No argument is necessary to establish the fact, under the pleadings and the evidence in this case, that if some other person shot the insured, that it was intentional and not by accident; hence death by accident or mischance was not presented by the pleadings as an issue, but was clearly eliminated from the case.

Therefore the authorities cited and contention made by plaintiff involving the question of accidental death or death by mischance are not applicable to this case; it is not a case made by pleadings based upon an *accident* policy creating a liability, upon a death, within the meaning of such accident policy against injury or death through "external, violent and accidental means," as were many of the cases cited by plaintiff, all of which, upon examination, are clearly distinguishable from the case at bar.

Plaintiff in her Brief, p. 77, referring to the case of Agen v. Metropolitan Life Ins. Co. (Wis.), 80 N. W. 1020, cited in defendant's Brief at pp. 85, 119, 127, 128, says,—

> "And, it is some satisfaction to call attention to the fact that whatever value the case may ever have been entitled to, it has been greatly weakened by the subsequent decisions of the Supreme Court of that state; for instance, in the case of Rohloff v. Aid Association (109 Northwestern Reporter, 989, 991)."

The Court in the Rohloff case, *supra,* did not adversely criticise the holding in the Agen v. Metropolitan Life Insurance Company case, *supra;* indeed, the Court seems to have approved the doctrine therein

stated. From the opinion in the Rohloff case, pp. 991, 992, we quote,—

> "The *facts* in this case are *very different* from those in the cases relied upon by counsel: Agen v. M. L. I. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Voelkel v. Supreme T. K. M. W., 116 Wis. 202, 92 N. W. 1104."

In Hart v. Fraternal Alliance, cited in the opinion just quoted, in 84 N. W. 853, the Court says,—

> "The verdict rendered was founded on mere speculation, and is against every reasonable probability in the case. * * * The judgment is reversed, and the cause is remanded for a new trial."

In Voelkel v. Supreme T. K. M. W., cited in the opinion in the Rohloff case, *supra,* the Court in 92 N. W. 1105 says,—

> "To us it does not seem that there is a single fact in the case that suggests any other cause of death than suicide. The proofs of death, with the accompanying circumstances referred to, make the case quite as strong against the plaintiff as in Agen v. Insurance Co., 105 Wis. 217, 80 N. W. 1021, 76 Am. St. Rep. 905, and Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851, and justify the trial court in its ruling. The judgment is affirmed."

Upon the whole case, we earnestly insist that the judgment is not warranted, is unjust, and should be reversed; that the rulings of the trial court during

the trial, complained of, were error; that the charge by the Court to the jury in all and each of the particulars complained of and assigned as error was error prejudicial to the defendant; and that the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Of Counsel.